

Patience is a virtue, or so we are told, and good things come to those who wait. So you might be forgiven for hoping that when the Government finally provided its separate new guidance document on [Holiday entitlement and pay during COVID-19](#), it would answer the numerous questions on this issue which have been circulating since the announcement of the Job Retention Scheme in March.

In the usual course, workers take their holiday throughout the leave year and the cost is spread across the year accordingly. During lockdown, individuals cannot in practical terms go away on holiday, which causes a looming accrual problem for employers. The risk is obviously that once lockdown is lifted, just at the time that employers may most want their workers back in their workplaces to get their businesses running again, they will receive a glut of annual leave requests.

As a partial answer to this issue, the government introduced a temporary new law amending the Working Time Regulations to allow workers to carry forward up to four weeks' paid holiday over a two-year period, if they cannot take that holiday due to coronavirus. However, there are obvious issues with this kicking-can-down-road approach for employers. It is for this reason that we have been advising employers to consider utilising their right under the WTR to require employees to take holiday during lockdown.

To date it has not been clear how the usual rules on holiday applied to those on furlough leave (and in particular whether holiday compelled by the employer in this way would still qualify for furlough support from HMRC), leaving a huge question mark hanging over employers' strategic planning. With an estimated 7.5 million workers now covered by the Scheme, all busily accruing and not taking holiday, this is potentially a huge cost to UK businesses. The good news is that the guidance does provide some clarity in relation to the interaction of annual leave with furlough, but sadly some of it still leaves you scratching your head as to what was actually intended.

Key points below:

- **Accrual:** Furloughed workers will continue to accrue both statutory holiday entitlements (5.6 weeks per year), and any additional holiday provided for under their contracts. This had previously been confirmed in the [employee guidance](#) on the Job Retention Scheme, but the [employer guidance](#) had remained strangely silent on this issue. There remains scope for academic legal debate about this but it is not worth having.

- **Taking holiday:** Workers on furlough can take holiday without disrupting their furlough. Importantly, the guidance also confirms that employers can require furloughed workers to take holiday at a specified time and can also cancel a worker's holiday, provided in each case that they give the requisite notice to the worker in accordance with the WTR.

The possible fly in the ointment, however, is the inclusion of the wording below:

"If an employer requires a worker to take holiday while on furlough, the employer should consider whether any restrictions the worker is under, such as the need to socially distance or self-isolate, would prevent the worker from resting, relaxing and enjoying leisure time, which is the fundamental purpose of holiday"

What on earth does that mean? The entire UK is currently socially distancing. Does that mean in fact none of us can properly take holiday anyway? And since when has it been law that a holiday must be restful, relaxing or (least of all) enjoyable? It is hard to see that someone stuck at home on furlough can deny that they have the opportunity to rest and relax, so we are then just considering whether an employee compelled to take leave at a particular time would enjoy it. The obvious answer to that, when he has nowhere to go, no-one to see and nothing to do, is not particularly. But once the employer has reached that completely inevitable conclusion, then what? Is it then prevented from requiring the employee to take leave?

That cannot be right. If this guidance follows the well-trodden path of the other guidance documents produced throughout this crisis, it will no doubt be updated on an iterative basis and perhaps this point will be addressed and in true Big Brother style (not that one – the original) be quietly airbrushed out of the record. For now, however, employers should be seen (and we recommend therefore keeping a note of this exercise) when requiring individuals to take holiday to consider whether anything in their particular circumstances during this pandemic might mean they are prevented from resting, relaxing and enjoying leisure time. A blanket approach requiring all furloughed employees to take a certain period of their accrued leave will probably now generate grievances (though not in our view viable legal claims) and so employers will need as a minimum to be willing to reconsider such instructions in cases of particular individual hardship, however hard they may be to imagine at this stage.

Our view is that the issues we all face due to social distancing, such as not being able to see family, sit in a beer garden or go abroad would not be enough to thwart the fundamental purpose of holiday for most people. And actually this also seems to be the Government's view as the guidance simultaneously confirms that workers who are on furlough are unlikely to need to carry forward statutory annual leave, as they will be able to take it during the furlough period. Some very muddled thinking here, it would appear.

- **Holiday pay:** As we had expected, the guidance confirms that holiday pay for furloughed workers should be calculated in line with current legislation and based on usual earnings i.e. the worker must receive 100% of their usual pay. Given that only up to 80% will be covered by the Scheme, the employer will be obliged to top up the rest. This should at least sweeten the pill for employees required to take holiday they would sooner have saved.
- **Bank holidays:** while it might have been helpful to have this guidance prior to the Easter or VE day bank holidays, we do now have a steer. The guidance confirms that if a furloughed worker would usually have had the bank holiday as annual leave, there are 2 options:
 - If the employer and the worker agree that the bank holiday can be taken as annual leave while on furlough, the employer must pay the correct holiday pay for the worker; or
 - If the employer and the worker agree that the bank holiday will not be taken as annual leave at that time, the worker must still receive the day of annual leave that they would have received. This holiday can be deferred until a later date, but the worker should still receive their full holiday entitlement.
- **Carry forward:** The guidance provides more information around when it will not be reasonably practicable for workers to take holiday due to coronavirus in accordance with the new law. An employer should consider various factors, such as:
 - whether the business has faced a significant increase in demand due to coronavirus that reasonably requires the worker to continue to be at work and cannot be met through alternative measures
 - the extent to which the business' workforce is disrupted by the virus and the options available to the business to provide temporary cover for essential activities
 - the health of the worker and how soon they need to take a period of rest and relaxation
 - whether there is time left in the worker's leave year to enable them to take holiday at a later date within that same year
 - the extent to which the worker taking leave would impact on wider society's response to, and recovery from, the coronavirus situation
 - the ability of the remainder of the workforce to provide cover for the worker going on leave

Employers should do everything reasonably practicable to ensure that the worker is able to take as much of their leave as possible in the year to which it relates, and where leave is carried forward, it is best practice to give workers the opportunity to take that holiday at the earliest practicable opportunity.

Importantly, the guidance also confirms that if, due to the impact of coronavirus on operations, the employer is unable to fund the difference between furlough pay and the 100% of pay a worker is entitled to receive for holiday days, it is likely that this would make it not reasonably practicable for the worker to take their leave, enabling the worker to carry their annual leave forwards.

Carried leave is still subject to the usual rules around payment in lieu. An employer must facilitate the worker taking their annual leave and cannot replace it with a financial payment, except on termination.

Of course, this does all leave employers with some difficult decisions to make. Should they require workers to take holiday during furlough to avoid a glut of accrual, or is the cost of topping up to 100% pay too much of a burden to bear at this point in the crisis? If they don't spread the cost across this leave year, does the employer have to gamble that business will pick up sufficiently during the next leave year to be able to deal with the amount of holiday workers have carried forward?

Unfortunately, there are no easy answers. However, at least employers will now be able to plan their approach based on something a little closer to certainty.

Contacts

Caroline Noblet

Partner, London
T +44 20 7655 1473
E caroline.noblet@squirepb.com

David Whincup

Partner, London
T +44 20 7655 1132
E david.whincup@squirepb.com